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In the Supreme Court of the United States

OCTOBER TERM, 1982

AVONDALE SHIPYARDS, INC.,
Petitioner

v.

KAISER ALUMINUM & CHEMICAL SALES, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ernest L. Edwards, Jr.*
Stephen R. Remsberg
Joseph N. Mole
B. Richard Moore, Jr.
Lemle, Kelleher, Kohlmeyer & Matthews
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Attorneys for Respondent

*Counsel of Record for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether, in an action based on contract, a court may refuse to entertain the defense of antitrust illegality where to enforce the contract clause at issue would not command any course of conduct that the antitrust laws forbid?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 2

Reasons for Denying the Writ 6

The Striking of Avondale's Antitrust Defense Complies with This Court's Decisions in *Kaiser Steel Corp. v. Mullins* and *Kelly v. Kosuga*. 6

Conclusion 14

TABLE OF AUTHORITIES

Cases: **Page**

Abercrombie v. Lum's, Inc.,
531 F.2d 775 (5th Cir. 1976) 8

Carpa, Inc. v. Ward Foods, Inc.,
536 F.2d 39 (5th Cir. 1976) 8

Continental Wall Paper Co. v. Louis Voight & Sons, Co.,
212 U.S. 227 (1909) 7

Kaiser Steel Corp. v. Mullins,
455 U.S. __, 102 S. Ct. 851 (1982) 8, 14

Kelly v. Kosuga,
358 U.S. 516 (1959) 6, 14

Northern Pacific Railway Co. v. United States,
356 U.S. 1 (1958) 12

Statutes and Rules:

Clayton Act § 4(b), 15 U.S.C. § 15(b) 4

Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2 9

Labor-Management Relations Act § 8(e),
29 U.S.C. § 158(e) 9

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Kaiser Aluminum & Chemical Sales, Inc., respectfully requests that the petition of Avondale Shipyards, Inc., for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 7, 1982, be denied. That judgment represents a correct application of the rule of the law laid down by this Court in *Kelly v. Kosuga*, 358 U.S. 516 (1959), and recently reaffirmed in *Kaiser Steel Corp. v. Mullins*, 455 U.S. __, 102 S. Ct. 851 (1982).

STATEMENT OF THE CASE

Kaiser Aluminum and Chemical Sales, Inc. ("Kaiser") initiated this action for simple breach of contract against Avondale Shipyards, Inc. ("Avondale") in the United States District Court for the Eastern District of Louisiana by filing an original complaint on July 9, 1979. On December 28, 1979, Avondale served its answer and counterclaim alleging, *inter alia*, breach of contract, breach of warranty, redhibition, negligence, duress, failure of consideration and cause, error as to the principal motive and cause, accord and satisfaction, release, estoppel, waiver, and compensation and set-off. In addition, Avondale alleged that Kaiser imposed upon Avondale an illegal tying arrangement in violation of the federal antitrust laws. Avondale asserted this antitrust violation in its answer as a defense to Kaiser's contract claim and in its counterclaim as an affirmative claim for treble damages.

This lawsuit arose out of a contract entered into between Kaiser and Avondale in May of 1973 whereby Kaiser agreed to construct and install two components of a cryogenic cargo containment system in three liquified natural gas ("LNG") vessels to be built by Avondale for various subsidiaries of the El Paso Natural Gas Company. This cryogenic cargo containment system was composed, in simple terms, of welded aluminum tanks coupled with a polyurethane foam insulation sprayed onto the inner hulls of the three LNG vessels. The Kaiser-Avondale contract,

as clearly set forth therein, defined the scope of the Kaiser work and set a fixed price therefor.

The contract also incorporated a standard "changes" clause that would permit Avondale to direct changes in the contract work. That is, it allowed Avondale to order Kaiser to perform work different from or in addition to that called for in the original contract. The contract further provided that Avondale would pay Kaiser "fair and reasonable" compensation for any change work Avondale directed Kaiser to perform. Should the parties be unable to agree on what constituted such "fair and reasonable" compensation, then Avondale was to pay Kaiser's estimate thereof pending the ultimate determination of those amounts owed Kaiser for such work. That determination would be made by a neutral finder of fact.

Throughout the course of the contract, a variety of delays and extra costs borne by Kaiser were occasioned by change work directed by Avondale. Yet Avondale refused to pay for much of this additional work that Avondale itself ordered Kaiser to perform. Kaiser thus instituted suit to recover "fair and reasonable" compensation for completed contract change work, all in accordance with the "changes" clause of the Kaiser-Avondale contract. In addition, Kaiser sought damages for acceleration, delay, and disruption incurred as a result thereof.

Along with numerous contract and tort-related

defenses to Kaiser's claim, Avondale alleged that Kaiser illegally tied the fabrication and erection of the aluminum LNG tanks to the purchase of the insulation portion of the Kaiser work. Avondale asserted its tying claim not only as a defense to Kaiser's action under the contract "changes" clause, but also as an affirmative claim for treble damages. By minute entry dated January 5, 1981, the district court dismissed Avondale's affirmative antitrust claim as time-barred by the four-year prescriptive period in antitrust actions as set out in Clayton Act § 4(b), 15 U.S.C. § 15(b). The district court also struck Avondale's antitrust defense as insufficient at law, citing *Kelly v. Kosuga*, 358 U.S. 516 (1959). Both the dismissal of Avondale's affirmative antitrust claim and the striking of Avondale's antitrust defense were certified as appropriate for appellate review. In a lengthy opinion, the Fifth Circuit Court of Appeals affirmed the district court's order in all respects. The dismissal of Avondale's affirmative antitrust claim, however, is not at issue here.

On appeal, Kaiser argued that *Kelly v. Kosuga* controlled these facts, and that the striking of Avondale's antitrust defense was in accord with that decision. Subsequent to briefing of the issues in that appeal but prior to oral argument before the Fifth Circuit panel of Judges Wisdom, Politz, and Tate, this Court decided *Kaiser Steel Corp. v. Mullins*, 455 U.S. __, 102 S. Ct. 851 (1982). In that case, this Court reaffirmed in no uncertain terms the rule of *Kelly v. Kosuga*: the defense of antitrust illegality should be entertained only in those cir-

cumstances where its rejection would be to enforce the precise conduct that the antitrust laws forbid.

This Court's opinion in *Kaiser Steel* was called to the attention of the court of appeals by letter from Avondale's counsel dated January 29, 1982, approximately six weeks prior to oral argument before the panel. Counsel for Kaiser and counsel for Avondale each spent substantial time at that argument addressing the impact of *Kaiser Steel* upon the issues before the court. In an opinion published on June 7, 1982, a unanimous panel affirmed the district court's dismissal of Avondale's antitrust defense in accordance with the rule of law first enunciated in *Kelly v. Kosuga* and recently reaffirmed by this Court in *Kaiser Steel Corp. v. Mullins. Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982).

Avondale then petitioned the panel for rehearing based, in part, upon the argument that the panel's decision conflicted with this Court's holding in *Kaiser Steel.* In addition, Avondale suggested to the court that the case was one appropriate for rehearing *en banc* on those same grounds. Both the petition for rehearing and the suggestion for rehearing *en banc* were denied by order dated July 26, 1982. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 683 F.2d 1373 (5th Cir. 1982) (*per curiam*).

REASONS FOR DENYING THE WRIT

The Striking of Avondale's Antitrust Defense Complies with This Court's Decisions in *Kaiser Steel Corp. v. Mullins* and *Kelly v. Kosuga*.

The essence of Avondale's argument in support of its petition is that this Court's recent opinion in *Kaiser Steel Corp. v. Mullins* reversed, restricted, or otherwise detracted from the holding of *Kelly v. Kosuga*, and that the court of appeals failed to take that fact into consideration in making its decision. Nothing could be further from the truth. In fact, quite the contrary, and clearly so. The plain language of *Kaiser Steel* leaves no doubt that *Kelly* remains the standard by which the sufficiency of an antitrust defense to a contract claim must be measured. Indeed, it is difficult to see how anyone could argue otherwise. Citing *Kelly v. Kosuga*, the district court struck Avondale's antitrust defense as insufficient at law. The court of appeals agreed, with specific reference to *Kaiser Steel* and the reaffirmation of *Kelly* therein. Unable to escape application of the *Kelly* rule in the lower courts, Avondale now seeks to persuade this Court that *Kaiser Steel* changed the law. This Avondale cannot do.

In *Kelly v. Kosuga*, this Court refused to accept an alleged antitrust violation as a defense to an action for debt on goods sold and delivered. The case grew out of a contract for the sale of onions. Kelly threatened Kosuga,

an onion grower, that he would dump some 1,000 cars of onions on the futures market unless Kosuga and other onion growers purchased a large quantity thereof from him. Fearing a sharp drop in price if Kelly made good on his threat, Kosuga was compelled to purchase 50 cars of those onions. He further agreed not to deliver any onions on the futures market for the remainder of the season. When Kelly sued Kosuga for failure to complete payment of the purchase price, Kosuga defended on the ground that the contract of sale was in violation of the antitrust law. The trial court struck the defense as insufficient at law, and the Supreme Court affirmed with the following language:

> Accordingly, while the non-delivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price.... [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question.
>
> 358 U.S. at 520.

Kelly v. Kosuga distinguished the Court's earlier opinion in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), as a case in which denial of the antitrust defense "would be to make the courts a party

to the carrying out of one of the very restraints forbidden by the Sherman Act." 358 U.S. at 520. In *Continental Wall Paper,* plaintiff sought to enforce a sale of goods at excessive and unreasonable prices. The Court permitted defendant, in that situation, to raise the defense of antitrust illegality, since to enforce the sale at the contract price would be to condone an illegal undertaking. The *Kelly* Court recognized this as the only factual setting in which the defense of antitrust illegality should be permitted, and quoted approvingly from Justice Holmes' dissent in that earlier case:

> The scope of the defense of illegality under the Sherman Act goes no further.... Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other peoples' property for nothing when they purport to be buying it."
>
> 358 U.S. at 520-21.

Kelly v. Kosuga has thus come to stand for the proposition that a district court may entertain the defense of antitrust illegality only in that narrow circumstance where its rejection would be to enforce the "precise conduct" that the antitrust laws forbid. *See, e.g., Carpa, Inc. v. Ward Foods, Inc.,* 536 F.2d 39 (5th Cir. 1976); *Abercrombie v. Lum's, Inc.,* 531 F.2d 775 (5th Cir. 1976). That principle was recently reaffirmed by this Court in *Kaiser Steel Corp. v. Mullins* in the context of a suit to

enforce an allegedly illegal contract clause, part of a collective bargaining agreement between Kaiser Steel and the United Mine Workers of America. That clause, referred to as the "purchased coal clause," required that Kaiser Steel report to the UMW on coal it purchased from non-UMW coal producers. In addition, it required Kaiser Steel to make contributions to a UMW trust fund based upon such purchased coal. Kaiser Steel neither reported on purchased coal nor made the required contributions. The UMW sued to enforce the terms of the contract clause, and sought thereby to obtain the allegedly illegal payments.

Kaiser Steel defended on the ground that, *inter alia*, the purchased coal clause violated the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2.[1] According to Kaiser Steel, requiring it to make contributions pursuant to the purchased coal clause based upon coal it acquired from non-UMW producers put those producers at a disadvantage in competing for sales to concerns like Kaiser Steel and penalized Kaiser Steel for shopping among sellers for the lowest available price. 102 S. Ct. at 856 & n.5. Both the district court and the court of appeals, assuming the purchased coal clause to be illegal, nevertheless refused to entertain the defense of antitrust illegality. The Supreme Court reversed.

The reason for the Court's decision was simply that the lower courts incorrectly applied *Kelly v. Kosuga* to the

1. Kaiser Steel also argued that the purchased coal clause constituted a "hot cargo" clause in violation of the Labor-Management Relations Act § 8(e), 29 U.S.C. § 158(e).

facts before them. Clearly, *Kaiser Steel* did nothing to change the law, nor to detract from the validity of the *Kelly* rule. This is readily apparent from even a cursory reading of the Court's opinion. Witness the following passage:

> Respondents construe *Kosuga* as standing for two general propositions: first, that when a contract is wholly performed on one side, the defense of illegality to enforcing performance on the other side will not be entertained; and second, that the express remedies provided by the Sherman Act are not to be added to by including the avoidance of contracts as a sanction. It is apparent from the opinion in that case, however, that both propositions were subject to the limitation that the illegality defense should be entertained in those circumstances where its rejection would be to enforce conduct that the antitrust laws forbid. In *Kosuga*, there were two promises, one to pay for purchased onions and the other to withhold onions from the market. The former was legal and could be enforced, the latter illegal and unenforceable.
>
> [*Kelly v.*] *Kosuga* thus contemplated that the defense of illegality would be entertained in a case such as this. If the purchased coal agreement is illegal, it is *precisely because* the promised contributions are linked to purchased coal and are a penalty for dealing with producers not under contract with the UMW.
>
> 102 S. Ct. at 858 (emphasis added and footnotes omitted).

Kaiser Steel reaffirmed that the illegality defense should be entertained only in those circumstances where

its rejection would be to enforce the precise conduct that the antitrust laws forbid. In *Kaiser Steel*, the very contract clause sued upon was that alleged to be illegal. To compel the defendant in that case to make the required contributions would be to command the payment of monies in specific violation of the Sherman Act. For this reason, the defense of antitrust illegality was allowed to stand.

Given this state of affairs, it is surprising that Avondale attempts to argue, as it now does, that *Kaiser Steel* operates to modify the holding of *Kelly v. Kosuga*. Failing to convince this Court that *Kaiser Steel* had the effect Avondale would like, Avondale next argues that the *Kelly* rule was incorrectly applied in the lower courts. This, too, is in error.

Avondale implies, for example, that the Fifth Circuit panel of Judges Wisdom, Politz, and Tate failed to give adequate consideration to this Court's opinion in *Kaiser Steel*. That is simply incorrect. *Kaiser Steel* was called to the court's attention by counsel for Avondale a full six weeks prior to oral argument. At that argument, it was the subject of much discussion among counsel for both parties and the court. In the opinion below, the court made specific reference to *Kaiser Steel* on several occasions, even to the point of rejecting one of Respondent's arguments as inconsistent with this Court's views expressed therein. 677 F.2d at 1059 n.20. It is misleading to suggest, therefore, that *Kaiser Steel* was the object of some neglect in the court of appeals.

More to the point, however, is that the opinion below strictly conforms to this Court's decision in *Kaiser Steel*. Unlike the situation presented in that case, the "changes" clause at issue here is not even alleged by Avondale to be part of a tying scheme. Nor does Avondale claim that payments due under the "changes" clause would constitute an illegally inflated or "tied" price for the aluminum tank work. Indeed, Avondale could not; for those payments, the amounts of which have yet to be determined by the district court, will be nothing more than "fair and reasonable" compensation for Kaiser work beyond the scope of the original contract and imposed upon Kaiser by Avondale pursuant to the contract "changes" clause. 677 F.2d at 1054. Thus, by refusing to entertain Avondale's defense of antitrust illegality, the district court would in no way be enforcing any course of conduct contrary to the provisions of the Sherman Act.

A more circumspect examination of Avondale's own argument makes this clear. Tying in this instance is the "precise conduct" forbidden by the antitrust laws. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958). Coercion is an essential element of any illegal tie: the forced acceptance of one product in order to obtain another. Yet, as the opinion below made clear, it was Avondale that controlled the operation of the

"changes" clause, not Kaiser. 677 F.2d at 1054. Contract "change" work, far from being forced upon Avondale by Kaiser, was performed exclusively at Avondale's command. Avondale's argument defies logic, and would contravene the clear understanding of the antitrust laws, by stating that Kaiser coerced Avondale into accepting work Avondale itself ordered Kaiser to perform.

In sum, this is simply not a case where to enforce the contract clause at issue would compel some course of conduct that the antitrust laws forbid. Contrary to Avondale's contention, Kaiser does not seek to have the court enforce any illegal tie. The only question presented herein, therefore, is that which this Court has answered not once but twice in the last twenty-five years. The defense of antitrust illegality should be entertained only in that narrow circumstance where its denial would be to enforce that "precise conduct" contrary to the provisions of the Sherman Act. Should this Court summarily reverse the decisions of the lower courts, it would, in effect, overrule *Kelly v. Kosuga* and those cases which have followed that line, including *Kaiser Steel.* Clearly such a result is not warranted here.

CONCLUSION

The decision of the court of appeals fully complies with this Court's holding in *Kaiser Steel Corp. v. Mullins*. That case did nothing to change the law; rather, it reinforced the rule of *Kelly v. Kosuga*. Because to enforce the contract "changes" clause at issue here would not command any course of conduct that the antitrust laws forbid, *Kelly* dictates that Avondale's illegality defense must fall. *Kaiser Steel* does not mandate a contrary result, nor require that the decision of the court of appeals be reversed. Respondent respectfully requests, therefore, that Avondale's petition for writ of certiorari be denied.

Respectfully submitted,

Ernest L. Edwards, Jr.
Stephen R. Remsberg
Joseph N. Mole
B. Richard Moore, Jr.
Lemle, Kelleher, Kohlmeyer & Matthews
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Attorneys for Respondent,
Kaiser Aluminum & Chemical Sales, Inc.